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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 773

LOUIS DAROCA,

Petitioner,

versus

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,

Respondents.

PETITION OF LOUIS DAROCA FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT OF PETITION.

MICHAEL M. IRWIN,
Attorney for Petitioner.

JAS. G. SCHILLIN,
Of Counsel for Petitioner.

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PETITION OF LOUIS DAROCA FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION.

To the Honorable the Supreme Court of the United States:

Now comes Louis Daroca, a citizen of the United States, residing in the Parish of Orleans, State of Louisiana, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to remove therefrom, for review here, the record in the cause therein pending, numbered 9557,

wherein petitioner is the appellant and respondents, Metropolitan Life Insurance Company and Travelers Insurance Company, are appellees, and shows:

I.

Metropolitan Life Insurance Company, the owner of an apartment house in New Orleans, had a general contract with J. A. Haase, Jr., Inc., to perform extensive repairs on said apartment house. Haase engaged the painting firm of Frank J. Matthew Co., Inc., under a subcontract to do the painting on said building.

II.

Petitioner, an employee of Matthew, the sub-contractor, while in the performance of his work as painter, and while standing on a scaffold erected along the side of the building adjacent to the *second* floor was struck on the head by a large, heavy window sash, which had become disintegrated and fell from the *fourth* floor, petitioner sustaining a serious fracture of the skull and other major injuries. The mortice or opening into which the tenons fitted became loose and opened wide, permitting the horizontal stiles to fall out, the vertical stile remaining attached to the frame.

III.

Travelers Insurance Company is insurer under a policy protecting Metropolitan, the owner, from liability to anyone injured on said building.

IV.

The general contractor, Haase, having agreed in the building contract to indemnify Metropolitan for any loss or damage occasioned by an accident on said building was called in warranty by Metropolitan, under the Louisiana law and under its express contract obligation, but the call was dismissed by the trial Judge on technical exceptions.

V.

Petitioner brought his action in the United States Court for the Eastern District of Louisiana (New Orleans Division), and Central Surety and Insurance Corporation, workmen's compensation insurance carrier for Matthew, petitioner's immediate employer, intervened to recover back from respondents the amount of compensation already paid, and to be paid, under the Louisiana Workmen's Compensation Law.

VI.

After a jury trial, the trial Court directed a verdict in respondents' favor, which was affirmed by the Circuit Court of Appeals, and petitioner's application for rehearing was denied on September 12, 1941.

VII.

Petitioner avers that the decision of the trial Court and the Circuit Court of Appeals are erroneous, in that said Courts have decided a most important question of local law directly in conflict with the applicable local decisions

and have decided an important question of general law in a way untenable and in conflict, not alone with the general weight of authority, but with prior decisions of the Fifth Circuit, precisely applicable and definitely decisive of the subject matter involved in this petition; that, since denial of rehearing, decision in *Duvernay v. Rossato* (infra, page 10), makes absolutely untenable doctrines announced in case at bar by Fifth Circuit.

VIII.

That petitioner files herewith his brief in support hereof.

IX.

That these questions of local and general law should be finally and authoritatively adjudged by this Honorable Court upon and after a full presentation to this Court of the merits of said questions on the part of petitioner and respondents.

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein numbered 9557, entitled Louis Daroca v. Metropolitan Life Insurance Company, et al., to the end that said case may be reviewed and determined by this Court as provided in Section 347, Title 28, U. S. Code, and applicable statutes, and that your petitioner may have such other further relief or remedy in the premises as this Honorable Court may deem appropriate

and in conformity with law, and that the judgment of the said Court of Appeals be reversed by this Honorable Court.

And your petitioner will ever pray.

MICHAEL M. IRWIN,
Attorney for Petitioner.

JAS. G. SCHILLIN,
Of Counsel for Petitioner.

AFFIDAVIT.

STATE OF LOUISIANA }
PARISH OF ORLEANS }

Personally came and appeared before me, the undersigned Notary Public, duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, Louis Daroca, who being duly sworn, deposes and says:

That he is petitioner herein; that he is a resident of the Parish of Orleans, State of Louisiana; that all of the facts contained therein are true and correct, and that as to those facts made on information and belief, deponent verily believes them to be true.

LOUIS DAROCA,
Petitioner.

Sworn to and subscribed before me
this 24th day of November, 1941.

ERASTE VIDRINE,
Notary Public.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

Opinion Below.

May It Please the Court:

The opinion of the Circuit Court of Appeals is reported in *121 F. (2), 917.*

Jurisdiction.

This application is made under the provisions of *Section 347, Title 28, U. S. Code.*

Louisiana Statutes Involved.

Revised Civil Code, Article 670. "Every one is bound to keep his buildings in repair, so that neither their fall, *nor that of any part of the materials composing them,* may injure the neighbors or passengers (construed to be passersby), under the penalty of all losses and damages, which may result from the neglect of the owner in that respect." (Parentheses ours).

Revised Civil Code, Article 2322. "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Statement of the Case.

The opinion below, R. 144 to 150, as well as our accompanying petition, completely states the case for petitioner. As a certain part of the case must be stated in argument, we make no further elaboration here.

Specifications of Error.

The Court below erred:

I.

In interpreting Articles 670 and 2322, *supra*, which impose an *absolute* liability upon owners in Louisiana, as necessitating that petitioner affirmatively prove negligence, there being no distinction between a third person and a tenant in the character or sufficiency of proof required under these articles.

II.

In holding that a presumption of negligence was not implicit under the law and jurisprudence of Louisiana.

III.

In holding that an owner is not liable to a workman on a building, an employee of a subcontractor, for the negligence of an independent contractor, notwithstanding contrary concessions in respondent's pleadings and briefs.

IV.

In holding that the maxim "*res ipsa loquitur*" did not apply.

V.

In holding that the evidence was insufficient to carry the case to the jury.

ARGUMENT.

We shall argue these specifications in their numerical order:

I.

The liability of owners of real property is so rigid and absolute that the only defense available in Louisiana to the present action is contributory negligence or an act of God.

Tucker v. Illinois Central R. R., 42 An. 114 (Supreme Court):

> "Ignorance of its (the building's) condition can be no excuse for any accident caused by its weakness."
>
> "In this case the defendant's standard of duty *was fixed and its measure defined by law.* It is the same under all circumstances and its omission is *negligence per se.*"

Barnes v. Beirne, 38 An. 289, 282 (Supreme Court), in discussing Articles 670 and 2322, R. C. C., holds:

> "The law makes it his (the owner's) duty to keep his building in proper order, so that no one may be injured thereby."
>
> "He (the owner) was bound to know whether repairs were or not necessary. Actual knowledge and wilful *neglect would have aggravated* his responsibility."
>
> "The law does not direct that any notice be given, or that any actual knowledge be shown as a condition precedent to recovery."
>
> "The owner is entitled to exoneration from liability when the accident is the result of a fortuitous event or vis major."
>
> See also *Badie v. Columbia Brewing Co.,* 142 La. 854, 77 So. 768; *Serio v. American Brewing Co.,* 141 La. 290, 74 So. 998; *Atkins v. Bush,* 141 La. 180, 74 So. 897.

The present action of petitioner is not comparable to the usual negligence action, but is based on the absolute duty imposed on an owner by the codal articles, which the decisions in Louisiana hold to be virtually that of *insurer (Tesoro v. Abate, infra).*

Heath v. Suburban Bldg. & Loan Assn., 163 So. 546, a decision by the Court of Appeal for the Parish of Orleans (intermediary Appellate Court) has been entirely misconstrued and misapplied by the Court below. It is explained and correctly interpreted in the case of *Mrs. Jeanne Staes Duvernay v. Mrs. Josephine Terranova, wife of Salvador Rossato,* No. 17,598 of the docket of the same Court which rendered the *Heath* decision. This last opinion was rendered on November 3, 1941, and had *not* been handed down when the Fifth Circuit denied petitioner's rehearing application on September 12, 1941.

As this case will probably not be officially reported before the delay expires for filing this petition, *necessity* demands that we quote copiously from it. It illustrates, in itself, the error committed by the Fifth Circuit in the case at bar.

The Court said:

> "But if she (plaintiff) was not a tenant, and was merely a third person occupying the premises through the right of occupancy which her husband had as tenant, she was thus a third person rightfully on the premises, and under the circumstances, they, as owners, were liable to her for injuries sustained as the result of such a defect. On several occasions, in other cases, it had been *contended* that the owner of a building is not liable to third persons rightfully on the premises unless the injury had resulted from *fault* on the part of the owner. But from all of those cases there has resulted a settled rule that because of the effect of Articles 670 and 2322 of our Code, an owner is liable to a third person for the results of accidents caused by defects in the owner's building, whether those defects were

latent or not. In Heath v. Suburban Building & Loan Association, 163 So. 546, we quoted from Hanover v. Brady, 148 So. 267, as follows:

" 'Although the liability of the house owner to a licensee or passerby is made to depend upon negligence, *the mere fact that the building is defective is in itself proof of that negligence*, and this, whether the defect is apparent and easily discoverable, or is such as would not be noticed except upon careful inspection.'

"In Tesoro v. Abate, 173 So. 196, we said:

" 'It is true that the jurisprudence of this state has broadened the language of Articles 670 and 2322 of the Code to such an extent that *the owner of a building practically insures any third person, rightfully on the premises, against injury* caused by the vices or defects of the building due either to construction or failure to make repairs. And this is so even though the property *is in possession of a tenant and the owner is not acquainted with the fact that some of the appurtenances of the building are in need of repair.* The basis of liability for any tort is fault, and the decisions *have presumed negligence* on the part of the owner *whether such negligence actually existed or not.*'

"See also Hughes v. Abate, 2 So. (2d) 68, in which appears the following:

" ' * * * even if we could treat Elnora Hughes as not being a tenant, but only a third person rightfully on the premises, still she could hold Mrs. Abate liable—not under Articles 2692-2695, but under either Article 670 or 2322, for, under both of these articles an owner is rendered liable for an accident which has resulted from failure to keep his building in repair and, under the latter article, he is liable where an accident results from a defect in the building which "is the result of a vice in its

original construction." *To state the matter very simply, an owner is liable to any person rightfully on or near the premises if, because of a defect, that person, being himself without fault, is injured.* Klein v. Young, 163 La. 59, 111 So. 495; Heath v. Suburban Building & Loan Association, La. App., 163 So. 546; Tesoro v. Abate, La. App., 173 So. 196; Morris v. Hava, La. App., 180 So. 216.' "

Therefore, the holding of the Court of Appeals "that a third person can recover only by *showing* the house owner has been guilty of negligence" is directly against the well established Louisiana rule.

II.

Under any view of the Louisiana law, and conceding *arguendo* that petitioner's recovery depends upon negligence, a presumption of negligence is implicit, not necessarily under the language of the codal articles, because presumptions are rarely created by statute, but under all the decisions cited in Part I of this brief. A violation of these articles is *negligence per se (Tucker case, supra).*

III.

The Court of Appeals says *(121 F. (2), 919)* that appellant, being "a workman engaged in making repairs to the building, employed for the very purpose of complying with the owner's duty to keep his building in repair," cannot recover "for any negligence of an independent contractor." Respondents *expressly* conceded this point in appellant's favor, and, in addition, the Circuit Court of Appeals relied upon a *dissenting* or *minority* opinion of

the Supreme Court of Louisiana in *Camp v. Church Wardens, 7 La. An. 321,* decided in 1852, to support the announced doctrine.

The Court below finds (p. 919) the ultimate *fact* of negligence against the contractor, because he removed the contraption devised to prevent the sash from falling. It has been amply shown that this fixture, if attached, would have prevented the sash from being opened violently or being blown against the side of the building by a gust of wind, which was respondents' *supposition* of the cause of the fall of the sash. (Opinion below, p. 920). Surely it was negligence on the part of the contractor to remove this contraption and thus create above the head of this innocent workman a *trap* or *hazard* without warning and unknown to him.

The decision in *Camp v. Church Wardens, 7 La. Ann. 321,* is strongly relied on by petitioner. The *prevailing* opinion by the Chief Justice in that case *allowed* recovery against both the independent contractor and the owner. The plaintiff was a *workman* on the building, just as in the case at bar. Justice Slidell wrote a concurring opinion and Justice Rost, the *dissenting* opinion. The distinction sought to be drawn by the Fifth Circuit in the case at bar between workmen on a building and passersby or guests was expressly rejected by the *prevailing* opinion. The Court held that the codal articles imposing liability on the owner were "entirely independent of the general rules concerning the responsibilities of masters and em-

ployers. * * * *The owner is rendered liable from the policy of the law alone.* He rarely knows anything about the security of the work, either resulting from the plan or its execution." In other words, *nonliability* for the act of an independent contractor does *not* apply to the rigid obligation of an owner in Louisiana, which is squarely apposite to the holding of the Fifth Circuit in *Hudgins v. Hann, 240 F. 387 (389)*. The *Camp v. Church* decision came in 1852, and the rule is now firmly imbedded in Louisiana jurisprudence, as our able opponents conceded. *(Freeman v. Spiro*, and other cases, *infra)*.

Peyton v. Richards, 11 La. Ann. 62, relied on by the Court below, merely affirmed the doctrine of *Camp v. Church*.

Burton v. Davis, 15 La. Ann. 448, relied on by the Court below, merely holds that the damage "was caused by workmen who were putting up a building in the immediate vicinity."

In *Gallagher v. Southwestern Exposition, 28 La. Ann. 943*, relied on by the Court below, the codal articles relied on by petitioner were not involved. The owner of land made a contract to erect a *new* building, not to repair an *old* one. No statutory nondelegable duty was present.

Robideaux v. Hebert, 118 La. 1090, concerned the use of a "spreader" machine, and the codal articles governing the repair of buildings were not involved.

If this Court should be inclined to give any weight at all to the decisions of *Peyton v. Richards, Gallagher v. Southwestern*, or the *minority* view of *Camp v. Church*,

supra, it is submitted that the sole reasoning upon which these cases were predicated has vanished, and the decisions in those cases are therefore entitled to no weight whatsoever.

The reason the Supreme Court of Louisiana gave in the *Gallagher* case (decided in 1876) for denying plaintiff's claim against the owner resulting from the negligence of the subcontractor was that the owner had no control whatsoever over the actions of the subcontractor. The Court held, therefore, that Article 2320 denied recovery, since the "master or employer" in order to be held liable under Article 2320 must have had an opportunity to prevent "the act which caused the damage". Said the Court:

> "One cannot be charged with fault for an act beyond his control. * * * If the proprietor could not control the action of Jordan, the subcontractor, in removing the wall which caused the damage to plaintiff the proprietor is not responsible for the fault or negligence of Jordan."

To the same effect is *Peyton v. Richards*, *supra*, and the minority view in *Camp v. Church*, *supra*.

But since the above ancient decisions were enunciated the Supreme Court of Louisiana has decided, *ex industria*, that Article 2320 foists liability on an owner or employer, even though such employer "may not have been able to prevent the act which caused the damage." *Ragas v. Douglas*, 139 La. 773; *Anderson v. Elder*, 105 La. 672; *Weaver v. W. L. Goulden Logging Co.*, 116 La. 473. The *Weaver* case reads:

> "It therefore may be said that the restriction on the liability of masters embodied in article 2320

> (2299) of the Civil Code *has been construed out of the text*, for the reason that it practically nullifies the liability of the master for the acts of his servants as imposed by the express terms of the same article."

And the ruling of the Court in *Lincoln v. Appalachian Corporation*, 146 La. 23, *infra*, is unalterably opposed to the idea that in order for an owner to be held liable for injuries caused to a workman on the premises the owner must have been *actively* culpable.

But, be all this as it may, the present rule in Louisiana is that an owner of real property is liable for the negligence of an independent contractor. In *Freeman v. Spiro, 172 So. 802* (Court of Appeal for the Parish of Orleans, 1937), plaintiff was injured through the negligence of an independent contractor in repairing an awning on the owner's property. The Court dismissed as immaterial the question of the independent contractor, holding that the strict liability foisted upon the owner by the Civil Code could not be abrogated by contract with an independent contractor. The Court further cited as controlling authority the prevailing view in *Camp v. Church, supra.* And the result would have been identical had plaintiff been working around the premises *(Appalachian case, infra)*. The case at car presents no issue of assumption of risk. That defense is not pleaded, nor argued, and cannot be supplied by the Court. In addition, only obvious risks are ever assumed.

Also bearing out the principle that this obligation of the owner may not be limited or nullified by contract

is *Mercury Insurance Co. v. Hodges, 199 So. 526,* in which the Court said:

> "It seems equally reasonable to hold, as we did in Clark v. Englehardt, supra, that if, *by law* or by contract, there is imposed on either of the parties an obligation to make such alterations, or to do such refinishing, the fact that an independent contractor has been employed to do the work will not *relieve* the party employing the contractor from *liability* for the results of the *negligence of the said contractor.*"

Thus, to paraphrase the language of the *Mercury Insurance Company* case, it is the law—both codal and jurisprudential—that the owner is bound to keep his buildings in a state of repair *(Articles 670, 2322)* and, if he undertakes to repair same, while so doing he is liable for all damage caused other persons *(Herbert v. Herrlitz, infra; Freeman v. Spiro, supra);* and "the fact that an independent contractor has been employed to do the work will not relieve the party employing the contractor from liability for the results of the negligence of the said contractor." See also *Clark v. Englehardt, 120 So. 498.*

We respectfully suggest that the following well-established principles are unassailable:

(1) The distinction, if any, between a workman on the building and a third person, accidentally on the premises, is favorable to the workman, who is present in the interest, and at the invitation, of the owner.

(2) The case at bar offers a classic illustration of an *exception* to the general rule of nonliability

for the negligence of an independent contractor, because,

(a) the owner's duty to "keep the subject of the work in a safe condition" is imposed by law, and hence nondelegable.

(b) the owner actually exercised supervision and control over the method of execution of the work.

We point with confidence to the opinion of the Fifth Circuit Court (Judge Foster concurring) in *Hudgins v. Hann, 240 F. 387 (389)*, to-wit:

> *"This rule* (contractee's exemption) *is not applicable where the law imposes upon the employer the duty to keep the subject of the work in a safe condition."*

The relationship of a workman on the building to the owner is ably treated by the Fifth Circuit in *Middleton v. Ross* (Judge Foster concurring), *213 F. 6*, one of the leading cases on the subject. And Judge Sibley in *Kuptz v. Sollitt, 88 Fed. (2) 532 (535)*, applied the universal rule that the workman "was exactly where he had been invited to be, and the inviter could be held guilty of negligence in inviting him there without seeing that the place was safe." In the *Middleton* case, the Fifth Circuit treated the owner *quo ad* a workman as the "inviter", as did the Louisiana Supreme Court in *Camp v. Church*, the *Appalachian* case, and others cited *infra*.

In *Stevens v. United Gas Co.*, cited as a controlling authority in the *Appalachian* case, *infra*, in discussing an action by a workman (an employee of the independent con-

tractor) against the owner, the Supreme Court of Louisiana said:

> "The plaintiff was not a trespasser or a mere licensee in his relation to the defendant. He was not there upon his own business alone or for personal pleasure. *He was there at the request of the defendant, and for the benefit and advantage of the defendant.*"

Stucke v. Railroad, 50 La. Ann. 172:

> "An invitation from the proprietor to come upon dangerous premises without apprising him of the danger, is just as culpable in the case of a servant as any other."

Thus, petitioner's status is higher than a mere licensee, *i. e.*, one accidentally on the premises.

This rigid statutory obligation is well shown by *Lincoln v. Appalachian Corpn., 146 La. 23* (Supreme Court), when one who owned property for only two days, was held for the negligence of his vendor, and plaintiff was, as here, a workman around the building, employed by an independent contractor. The owner, unable to escape the harsh responsibility of the codal articles, was allowed recovery from his vendor, the real culprit *(151 La. 41)*. A workman's legal position was favorably distinguished from that of a third person, a distinction sought to be made in the *Heath* case unfavorably to a third person as compared to a tenant.

Mahon v. Spence, 11 La. Ap. 604, 123 So. 349 (Court of Appeal, Parish of Orleans):

> "The entire question is one not of contractual obligation, but of liability imposed by law.

> We concede that this liability does not exist in favor of the general public, but only for the benefit of those who may, in the ordinarily contemplated course of events, be brought into contact with the defective work. That the law requires the master to furnish to the employee a safe place to work, and that, therefore, the *master* in the absence of compensation laws, *might have been liable in tort*, will not relieve Spence (independent contractor) of his responsibility, because, to the extent that Smith (plaintiff) was justified in using the sagger bar as a brace, *Spence was, in effect, the agent of the employer (the owner)* for the purpose of making safe the place furnished for the performing of the work." (Parentheses ours).

Therefore, the owner in the case at bar, under the above quoted rule, would have been liable *in tort* to petitioner had petitioner been employed directly by it instead of by the owner's subcontractor, Matthews. Is the owner to be excused because a workman thrice-removed (contractor and subcontractor intervening) has been hurt through the independent contractor's negligence? Surely, if respondents' own immediate employee could recover in the case at bar, under the obligation of respondent to furnish a safe place to work, then *a fortiori* can petitioner recover, because, under the *Mahon v. Spence* case the general contractor is merely "the agent of the owner for the purpose of making safe the place furnished by the owner for the performing of the work." And the owner owes the same *duty of safety* to the employees of an independent contractor or subcontractor as he owes to his own servants. *(Appalachian* and *Middleton* cases, *supra).*

When the duty to repair is imposed by law and non-delegable, liability subsists in the owner although he has divested himself, personally and actually, of all control over the work. In the *Hudgins v. Hann* case, *supra*, the Fifth Circuit conceded (p. 389) that the independent contractor in that case had "the right to determine what shall be done and the manner of doing it", yet the Court held the owner nevertheless.

However, the cases are legion which hold the owner (or contractee) liable—in every case and without exception or qualification—where the owner or contractee exercises discretion and control over the acts of the contractor (R. 94 and 103, testimony of Parham, the owner's representative). Even under the most unfavorable, or minority, view of the case of *Camp v. Church*, *supra*, this result follows. Some of the numerous cases which hold the owner or contractee liable under such circumstances are *Cunningham v. Penn Bridge Co.*, 131 La. 196; *Englert v. New Orleans Ry. & Light Co.*, 128 La. 473; *Faren v. T. J. Sellers & Co.*, 39 La. Ann. 1011; *E. C. Taylor Co. v. New York & Cuba Mail S. S. Co.*, 159 La. 382; *Ecuyer v. Benevolent Ass'n of Elks*, 152 La. 73.

The decisions in Louisiana, without exception, adopt the rule laid down by the Fifth Circuit in *Hudgins v. Hann*, *supra*, when our Courts have been called upon to apply the rigid rule of liability imposed by Articles 670 and 2322, R. C. C. That the point is not even debatable is undoubtedly the reason our learned opponents conceded it.

Broadly stated petitioner's position is as follows:

Under Articles 670 and 2322, R. C. C., the owner of real estate in Louisiana is under the absolute, nondelegable, statutory duty of maintaining his premises in a good state of repair. This duty is a continuing one, and is not suspended while the repairs are being made. The owner is answerable when the damage results from his *neglect* to repair *properly*. Realizing its building was in dire need of repair ($50,000.00 contract) respondent was performing its statutory obligation. It engaged a contractor to do for it what respondent was under a legal duty to do *itself*. The contractor acted negligently, thus making the owner liable for injury suffered to the same extent as if it had neglected to make the repair originally. This was *squarely* held in *Herbert v. Herrlitz (146 So. 65), infra.*

Liability under this count of the petition was *expressly* conceded in petitioner's favor by respondents' answer and in its briefs, both in the trial Court and Court of Appeals.

In Articles IX and X of the petition (R. 5) petitioner charged the contractor with negligence in loosening or detaching the window sash from its holdings. Respondents did not deny this charge of negligence, but, on the contrary, admitted "such would constitute negligence". They then called the contractor in warranty to "answer the charge of negligence against it." (R. 17). This call was dismissed by the trial Court on an exception that respondents must wait until judgment was rendered against them and then proceed against the contractor. *Respondents did not plead nonliability for the negligence of the contractor.* It is an

affirmative defense, to be specially pleaded and proved. *(Taylor v. N. Y. Co., 159 La. 381; 105 So. 379)*, and we respectfully submit the Court should not supply it.

As the contractor, in the building contract, had agreed to indemnify respondents for damage, such as petitioner incurred, respondents asked for judgment over and against the contractor. Respondents, apparently realizing their legal responsibility for the negligence of the contractor, protected themselves against such an action as the one herein filed. Irrespective of contract, respondents would have this right under Louisiana law *(Appalachian Corporation v. Brooklyn Cooperage Co., 151 La. 41)*. Under the new Federal Rules the contractor could be made third-party defendant. So that respondents lose nothing by an adverse verdict in this case, and ultimately the *actual* tort-feasor must pay. An affirmance, however, denies relief to an innocent victim and permits even an *admittedly active culprit* to go unwhipped of justice.

The following appears in respondents' brief in the trial Court:

> "We submit that defendant has *never* advanced the contention that because the repairs were made by an independent contractor, it would be, in any event, absolved from ultimate liability."

The only significance attached by respondents to the repairs being made by an independent contractor was that possession of the premises was not in the owner, which rendered inapplicable the doctrine of "*res ipsa loquitur*" (respondents' brief in the Court of Appeals, pp. 12-13); in other words, that petitioner must *affirmatively prove*

negligence on the contractor's part in order to hold the owner.

Not only are respondents liable for the negligence of the contractor, but they are directly responsible for their own negligence. There is sufficient evidence in this record to convict them of *direct* negligence. The trap or hazard created above this petitioner's head, as he did his work, was well known to the owner's agent, Parham (R. 102), and he did nothing to correct the situation. Respondent is a corporation and can only act through an agent (R. 94). Parham did not insist he had examined this particular window and sash, and frankly admits "it could easily be overlooked," although it was his duty to examine every sash (R. 103). The contractor's foreman insisted (R. 94) Parham had approved the condition of this particular sash. Parham not only supervised the work under this contract, but actually controlled the method of its execution to the extent that he instructed the foreman "as to how the work could best be handled." (R. 94 and 103).

Herbert v. Herrlitz, 146 So. 65 (Court of Appeal, Parish of Orleans):

> "A person who actually makes repairs to his building, but does so in such a negligent manner that injury results is liable *to the same extent as if he had neglected to make the repairs originally.*"

In *Hayes v. Oertel, 195 So. 388 (390)*, in an action *by a third person against the owner*, the Court said:

> "It appears to be thus settled that, though failure to repair a defect is merely passive negligence, *negligently* to erect a dangerous structure is active negligence."

Therefore, even treating the case at bar as an ordinary negligence action, respondents are nevertheless liable.

The Supreme Court of Louisiana in *Lee v. Powell Bros. & Sanders Co., 126 La. 51*, said:

> "What caused the lever to move, after having been left unlocked or insecurely locked, no one knows.
> * * *
>
> "What caused it to move is immaterial. The chain of causation by which responsibility is to be fastened upon the defendant company need not be followed beyond *the negligence of leaving it in a condition in which it might move at any time from a thousand accidental causes, or perhaps of its own weight*, so that its movement might be expected at any moment.
> * * *
>
> "One who creates a danger which thus, as it were, hangs by a thread, and may at any time fall, which is bound sooner or later to fall, is responsible for the consequences of its fall. *The efficient or juridical cause of the injury in such a case is the creation of this danger.*"

IV.

An innocent laboring man lawfully on these premises performing his duty was struck from above by a part of respondents' property falling on his head. He does not know, nor does the law require him to prove, precisely what caused the sash to fall. A superior knowledge of the cause is imputed to respondent. Petitioner is aided by the doctrine of *res ipsa loquitur*, and in the instant case by a presumption of negligence imposed by the statute law and decisions in Louisiana governing responsibility of real property owners to innocent victims. These decisions are

cited in Part I of this brief, and should not necessitate resort to the general rule of "*res ipsa loquitur*".

"Falling objects" have always been held to peculiarly require application of the doctrine. A full discussion of this subject will be found in *45 Corpus Juris, Sec. 771, P. 1201*, where innumerable cases are cited.

Respondents concede the force and logic of the authorities, but contend that the doctrine of *res ipsa loquitur* does not apply, because the building had been turned over to the general contractor for repairs and that the element of exclusive control, so essential to the application of the doctrine is wanting. In other words, that possession and control were in the general contractor and not the owner. Of course, the mere fact that the owner has employed an independent contractor to repair his house does not mean he has relinquished control. His architect, Parham, reserved supervision, control and *direction* (R. 94 and 103).

The presumptive negligence rule recognized by the Louisiana decisions, *supra*, is, of course, not limited to owners who occupy their own properties, nor is the general rule of "*res ipsa loquitur*" so restricted.

The requirement that in order to invoke the doctrine respondent must have exclusive control of the thing causing the injury, of course, does not apply to *real property*. And the reasons which permit the injured person to be aided by this maxim are just as cogent whether the building is occupied or unoccupied and undergoing repair. He knows no more about the cause of the accident because a

contractor happens to be working on the premises. The same superior knowledge, however, is imputed to the owner, although a contractor is making repairs or a tenant is in possession.

> "The doctrine of *'res ipsa loquitur'* is based upon proposition that where defendant is shown to be in a better position to explain the accident than plaintiff, and where circumstances of its occurrence indicate that plaintiff cannot be expected to have any information as to causes of accident, which is of a kind that does not occur ordinarily when due care has been exercised, the rule of evidence is that the accident speaks for itself, *'res ipsa loquitur'*, or that a presumption of negligence arises from the fact itself of the accident. *Loprestie v. Roy Motors, Inc., 185 So. 11, 191 La. 239.*" (Supreme Court).

The general rule throughout the States is the same.

Sinay v. Chesebro, 140 N. Y. S. 1074:

> "The fall of a board from a shed erected by defendant, in front of a building being erected by it, to protect pedestrians, raised a presumption of negligence by defendant."

Goldstein v. Levy (Supreme Court of New York), *132 N. Y. S. 373:*

> "*Evidence tending to show that inspections were carefully and regularly made is insufficient to establish that the accident itself was not caused by the defendant's negligence.* The circumstance and character of the occurrence was such as to call for the application of the doctrine of *res ipsa loquitur.* The accident was unusual. The plaintiff could not be expected to define its exact cause. If the inspections which the defendant claim were made *had been carefully made,* is it not conceivable that the defect

which caused the shade to fall might have been discovered. If one may be held liable for the fall of a wall upon a pedestrian *(Mullen v. St. John, 57 N. Y. 567, 15 American Report, 530)*, or an innkeeper for the fall of plaster from a ceiling upon a guest *(Morris v. Zimmermann, 138 App. Div. 114, 122 N. Y. Supp. 900)* we can see no good reason why the same principle which was applied in those cases should not be held applicable here.

The facts proved by the plaintiff established a prima facie case which was put in issue by the proof of care which the defendant claims she exercised. This issue was properly submitted to the jury for their determination, and, in our opinion, the verdict of the jury in favor of the plaintiff cannot properly be held to be contrary to the evidence or the law. In our judgment, the learned trial court erred in setting aside the verdict."

Jones v. Riverside Bridge Co., 73 S. E. 942, 70 W. Va. 374:

"The trial court correctly disposed of the case upon the theory *that the lack of evidence, showing just how the board happened to fall, is aided by a presumption or inference of negligence, which the jury might draw, under the res ipsa loquitur rule.*"

V.

There is substantial evidence that insufficient paint caused a looseness in the mortise, so that the tenons did not adhere tightly in the joints of this weatherbeaten window sash (R. 66). The work had not reached the painting stage when this sash fell on petitioner's head (R. 81, 109). Lack of paint was as much a defect or ruin, within these codal articles, as a decayed condition. The foreman insisted the

architect approved the sash (R. 94), although the latter is not so insistent (R. 103), presenting a direct conflict in veracity or recollection. That a single perfectly sound sash, out of some couple of hundred (R. 101), struck the masonry, being blown or opened violently against the building, is *admittedly* speculation (R. 97), even pretermitting the negligence in not timely reattaching the fixture. Certainly the very self-serving testimony of respondents' witnesses (including employees of independent contractor, who must ultimately pay), that two weeks before this unfortunate mishap they examined the sash and "it looked all right", does not transpose this litigation from a jury case into one to be decided peremptorily as a matter of law. The sash *itself* is in evidence, and petitioner is entitled to have a jury decision on its physical condition. Petitioner should not be forestalled by the factual verdict of their Honors below. The presumption of negligence itself is sufficient to compel a reference *(Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 67 L. Ed. 815)*. In *Dotson v. Louisiana Central Lumber Co., 144 La. 78, 80 So. 205*, the Louisiana Supreme Court held that "if * * * there arises a presumption of negligence on the part of a defendant * * * then the proof of absence of negligence *is upon the defendant.*" Specific allegations of negligence by a plaintiff are regarded as surplusage *(Loprestie v. Roy, supra)*. In *Minneapolis R. R. v. Gotschall, 37 S. Ct. 598, 244 U. S. 66*, the jury was permitted to *infer* negligence, because "of the positive duty *imposed by the statute.*"

Conclusion.

We unhesitatingly say that the opinion below is *without precedent* under Louisiana jurisprudence, which the Fifth Circuit is *obliged* to follow under the rule in *Erie v. Tompkins, 304 U. S. 64, 58 S. Ct. 817.*

Respectfully submitted,

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